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No. 89-61

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

vs.

FILIBERTO OJEDA RIOS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the evidentiary exclusion of certain Title III recordings, pursuant to 18 U.S.C. §2518(8)(a), where the government: (1) failed to submit those recordings for judicial sealing for several months; and (2) provided no satisfactory explanation for such failure.

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STATEMENT OF FACTS

The respondents in this case are nine Puerto Rican nationals who are committed to obtaining independence for their country. They were arrested at their homes in Puerto Rico on August 30, 1985, in a pre-dawn operation conducted by the F.B.I. with the assistance of the United States military. At the time of the arrests, more than three dozen searches were carried out on the island, involving homes and offices of many unindicted individuals.

After being presented in the federal district court in San Juan, the respondents were removed from Puerto Rico by military aircraft and taken to a secret location in the United States. Neither their lawyers nor their families were advised of their whereabouts until they appeared in the district court in Hartford on September 3, 1985.[1]

Prior to the arrests of the respondents, the government had conducted a massive, 17-month electronic surveillance investigation in Puerto Rico. More than 1,000 recordings were generated and eventually presented for judicial sealing. The surveillance orders covered eight

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[1] These nine respondents are among 19 individuals who were indicted in connection with the robbery of a Wells Fargo depot in West Hartford, Connecticut, on September 12, 1983. It is undisputed that the robbery, in which no one was injured, was carried out by Wells Fargo guard Victor Gerena. The government's allegations against these nine defendants, all of whom were living and working in Puerto Rico at the time of the robbery, are that they aided and abetted the robbery, and/or participated in the alleged transportation of stolen money from the United States to Mexico.

separate locations, including private residences, businesses, private and public telephone lines, and an automobile. A special prosecutor from the Department of Justice, Frank Bove, was sent to Puerto Rico to oversee the electronic surveillance investigation.

The first electronic surveillance order, which targeted a private residence and a bank of three public telephones in Levittown, Puerto Rico, was issued on April 27, 1984. Two extensions were obtained, in May and June, 1984. The final extension order expired on July 23, 1984. However, both the residence and telephone surveillance actually terminated two weeks earlier, on July 9, six days after defendant Ojeda-Rios moved out of the apartment. None of the Levittown tapes were judicially sealed until October 13, 1984, 96 days after the surveillance ended and 82 days after the final extension order expired. These tapes were ordered excluded by the district court, and that decision was affirmed by the court of appeals. Pet.App. 12a, 69a.

On January 18, 1985, the government obtained an order authorizing wiretaps of two public telephones in Vega Baja, Puerto Rico. The order expired on February 17, 1985. A new wiretap order was obtained on March 1, 1985. Subsequently, two extensions were granted and the final order expired on May 30, 1985. All of the Vega Baja telephone tapes were judicially sealed on June 15, 1985. The district court ruled that the March 1, 1985 order was not an extension of the January 17th order, and found the delay in sealing the first set of Vega Baja telephone tapes to be 118 days. Those tapes were ordered excluded by the district court, and the order was affirmed by the court of appeals. Pet. App. 13a-14a, 83a.

While none of the other electronic surveillance recordings were excluded, the district court ruled that the government failed to immediately seal the tapes from all but one other surveillance location.[2] The court found: (1) sealing of the Taft Street and El Cortijo telephone wiretaps was delayed for 19 days, Pet. App. 75a; (2) sealing of the Vega Baja residence tapes was delayed for 15 days, Pet. App. 79a; and (3) sealing of the El Centro Condominium tapes was delayed for 14 days, Pet. App. 92a-93a.

The government offered a single explanation for its failure to immediately seal the Title III recordings excluded by the lower courts. With respect to the Levittown tapes, Supervisory Attorney Frank Bove swore in an affidavit dated December 31, 1986, that he delayed sealing the Levittown tapes for three months after the final extension order expired, relying on his belief that judicial sealing could be deferred until "there occurred a meaningful hiatus in [the government's] authority to intercept communications [at any location] . . . ." J.A. 5. The same excuse was put forward in an effort to explain the

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[2] The district court ruled that the only tapes timely sealed by the government were those intercepted from a Datsun Sentra automobile. Pet. App. 69a. The record is clear, however, that no conversations were recorded for the 71 days preceding the sealing, and none of the named targets were observed near the Datsun during that time period. Pet. App. 71a-72. Thus, substantial doubt remains regarding the timeliness of the sealing of those tapes, as well.

government's delay in sealing the first set of Vega Baja telephone tapes. J.A. 6-7.[3]

SUMMARY OF THE ARGUMENT

There is no dispute that 18 U.S.C §2518(8)(a) expressly requires that all Title III recordings be sealed immediately upon the expiration of each electronic surveillance order, or extension thereof. It is also undisputed that §2518(8)(a) contains an independent exclusionary remedy, which applies whenever the judicial seal required by the statute is absent, unless the government provides a satisfactory explanation. The government's claim, unsupported by any clear precedent, that the exclusionary remedy expressly contained within §2518(8)(a) applies only to unsealed tapes, ignores the plain language of the statute and settled rules of statutory construction. Section 2518(8)(a) is the only provision of Title III which contains its own, independent exclusionary remedy. To distort its plain meaning by limiting the remedy only to unsealed tapes would lead to absurd results that Congress did not intend. The government's invitation to this Court to rewrite this express statutory

[3] Bove also offered an alternative excuse for the Vega Baja delay, asserting that time was needed for the Justice Department to submit a "revised and expanded affidavit" to the issuing judge. J.A. 7. The government ultimately conceded, however, that the "revised and expanded" affidavit was not, in fact, submitted in support of the March 1, 1985 application, as claimed by Bove. Gov. C.A. Br. 9-10.

requirement ignores the fundamental principles of separation of powers and judicial restraint. This Court should affirm the ruling of the court below that immediate sealing (or a satisfactory explanation for noncompliance) is a prerequisite to the evidentiary use of Title III recordings (pp. 6-16).

The statutory requirement that the government provide a satisfactory explanation for tardy judicial sealing is not met by proof of tape authenticity. The statute provides the government with two alternative vehicles for compliance: (1) immediate sealing; or (2) a satisfactory explanation for the failure to do so. The government's effort to designate proof of tape integrity as an additional exception to the statutory exclusion remedy is antithetical to fundamental rules of statutory construction, and impinges upon the exclusive domain of Congress. The adequacy of the government's explanation properly depends upon an evaluation of all relevant factors which shed light on *why* the government failed to immediately seal the tapes. That was the approach employed below (pp. 17-31).

The ruling by the court of appeals that no satisfactory explanation was provided for the egregious delays in sealing at issue here is fully supported by the record. The government intentionally decided not to seal hundreds of tapes for several months, ostensibly based upon a legal theory unsupported by the statute itself, any precedent, or even common sense. The proffered "explanation" is, in reality, a *post hoc* justification which has changed over time. Faced with repeated violations of the sealing provisions, the district court excluded only a limited portion of the wiretap evidence. That determination, which was

upheld on appeal, should not be disturbed. The totality of the circumstances here, including the extraordinary delays, the repeated nature of the statutory violations, and the lack of any reasonable explanation offered by the government, fully justifies exclusion of the tapes at issue (pp. 32-40).

Finally, even if the explanations for late sealing offered by the government could pass muster, there are substantial reasons to doubt their veracity. The evidentiary record reveals that the reel-to-reel recordings which were eventually sealed do not reflect the entirety of the government's electronic eavesdropping campaign. F.B.I. monitoring agents also secretly employed independently-operated cassette recorders which could and did record material not appearing on any sealed tape. Moreover, F.B.I. agents admitted to having engaged in the unlawful practice of eavesdropping without recording during the course of this investigation. Under the circumstances, the government's self-serving excuses for violating §2518(8)(a) should be approached with great skepticism (pp. 40-49).

ARGUMENT

I. ELECTRONIC SURVEILLANCE RECORDINGS ARE SUBJECT TO EXCLUSION UNDER 18 U.S.C. §2518(8)(a) WHEN THE GOVERNMENT VIOLATES THE STATUTORY REQUIREMENT OF IMMEDIATE SEALING.

A. The Immediate Sealing Provision of Title III.

Following extensive legislative study and debate, Congress enacted Title III of the Omnibus Crime Control

and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, as a comprehensive scheme governing the use of electronic eavesdropping by law enforcement agencies. The statute was explicitly designed to meet the constitutional objections to unregulated electronic surveillance articulated by this court in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in 1968 U.S. Code Cong. and Ad. News*, 2112, 2153. *See also United States v. Donovan*, 429 U.S. 413, 426-427 (1977). The drafters of the statute were also concerned with safeguarding the integrity of electronic surveillance recordings following their creation. *United States v. Mora*, 821 F.2d 860, 867 (1st Cir. 1987); *United States v. Gigante*, 538 F.2d 502, 503 (2d Cir. 1976). Title III contains myriad specific requirements to serve these legislative purposes.

The statutory provision at issue here reads, in pertinent part, as follows:

> Immediately upon the expiration of the period of the order [authorizing electronic surveillance], or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions . . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

It is undisputed that this provision requires the government to seal its Title III recordings "immediately." The parties disagree, however, over whether or not §2518(8)(a) prescribes any remedy for noncompliance

with that directive. The court of appeals held, and respondents agree, that the statute mandates the exclusion of electronic surveillance recordings for a violation of the immediate sealing requirement unless the government offers a satisfactory explanation for its failure to comply. Pet. App. 6a. The government now argues for the first time that the statute provides *no* remedy for a failure to seal immediately, irrespective of the duration of delay or the reasons for noncompliance.[4] Resolution of this clear dispute depends upon a proper application of settled principles of statutory construction.

B. The Plain Language of §2518(8)(a) Renders Compliance with the Immediate Sealing Requirement, Or a Satisfactory Explanation for Non-Compliance, A Prerequisite to the Evidentiary Use of Title III Recordings.

The first rule of statutory construction is that the plain language of an enactment is ordinarily controlling. Courts should refrain from looking any further where the statutory language is clear. *United States v. Locke*, 471 U.S. 84, 95-96 (1985). An "extraordinary showing of contrary intentions" manifested by legislative history is required

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[4] It is noteworthy that the government made no such contention in either the district court or the court of appeals. This court ordinarily refrains from deciding legal issues neither raised nor adjudicated below. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The government's belated argument should be dismissed on that ground alone.

to justify departure from the plain language of a statute. *United States v. Albertini*, 472 U.S. 675, 680 (1985).[5]

The statutory subsection at issue here, 18 U.S.C. §2518(8)(a), first requires that Title III recordings be judicially sealed "immediately" and then establishes "the presence of the seal provided for by this subsection" as a "prerequisite" for the evidentiary use of such recordings. There is nothing ambiguous about either the meaning of these two statutory provisions or their interrelationship within the same subsection of Title III. The latter, remedial provision simply dictates the consequences of noncompliance with the former, substantive requirement.

The government's fanciful suggestion that these two parts of the subsection are entirely unrelated defies logic and language. It is not the presence of any seal, but rather *"the seal provided for by this subsection,"* which constitutes a prerequisite for admissibility. The latter provision expressly incorporates the former by reference. *United States v. Gigante*, 538 F.2d at 506. The government would simply read that internal reference out of the statute entirely.

The sole requirement of judicial sealing specified by the statute is that it be accomplished "immediately." It is

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[5] A review of the legislative history of Title III, including the relevant committee reports and floor debates, reveals nothing to suggest that Congress intended that the plain language of the immediate sealing provision be disregarded in construing the statute. Thus, the Court must rely upon the words of the statute and, if necessary, upon the principles of statutory construction discussed *infra* at pp. 10-16 to resolve any ambiguity.

not simply sealing, but rather *immediate* sealing, which is "provided for by this subsection." Thus, according to the plain language of §2518(8)(a), noncompliance with the immediate sealing requirement, absent a satisfactory explanation, mandates the exclusion of Title III recordings at trial. The government's argument to the contrary, devoid of linguistic or precedential support of any kind, should be rejected.

C. Other Established Tools of Statutory Construction Confirm that Immediate Judicial Sealing, Or a Satisfactory Explanation for Delay, Is a Prerequisite to the Admission of Title III Recordings.

Where the plain language of a statute is inconclusive, a reviewing court employs traditional aids of statutory interpretation in an effort to glean its intended meaning. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 13 (1981). In the instant case, the plain language of the statute is sufficient to belie the government's position. In any event, the following rules of statutory construction compel the same result:

(1) A statute should generally be construed so that no portion of the enactment will be rendered meaningless or superfluous, *Mountain States Telephone Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985);

(2) Inclusion of particular language in one statutory section, but not in another, is presumed to be intentional, *Russello v. United States*, 464 U.S. 16, 23 (1983);

(3) Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions

are not to be implied in the absence of clearly contrary legislative intent, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980); and

(4) A statute should not be construed in a manner which produces absurd results, *United States v. Turkette*, 452 U.S. 576, 580 (1981).

An application of these principles to the statutory provision at issue here confirms the direct relationship between the immediate sealing requirement of §2518(8)(a) and its explicit, self-contained exclusionary remedy for noncompliance. The phrase "provided for by this subsection," describing the seal required as a prerequisite for admissibility, should be afforded some meaning. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (courts have a duty "to give effect, if possible, to every clause and word of a statute"). The government's interpretation of the statute would render that language a nullity. In the government's stated view, the presence of *any* seal affixed at *any* time would presumably suffice. That is not what the statute says or what it should be presumed to mean. *United States v. Gigante*, 538 F.2d at 506 (government's interpretation "completely elides the statutory requirement of a 'seal *provided for by this subsection*' ") (emphasis in original).

Moreover, while Title III contains a plethora of specific requirements governing the authorization and conduct of electronic surveillance, §2518(8)(a) is the only substantive provision which carries its own explicit

exclusionary remedy for noncompliance.[6] The inclusion of such a remedial provision in the sealing subsection of the statute should not be presumed unintentional. On the contrary, it serves to underscore the importance Congress attributed to protecting the integrity of electronic surveillance tapes. *See Russello*, 464 U.S. at 23.

It is inconceivable that Congress would have gone to the special lengths of engrafting an express exclusionary provision onto §2518(8)(a) if all that was required to circumvent that remedy was to slap a seal on the tapes at some point prior to their introduction into evidence. Such a formalistic exercise would do nothing to safeguard the integrity of Title III recordings, nor would it serve to reduce the opportunity for tampering. Moreover, since Congress specifically provided that the government could avoid exclusion of late-sealed tapes if it provided a satisfactory explanation for noncompliance, it should not be implied that Congress intended, in the alternative, that the government could also avoid exclusion by obtaining a tardy seal at any time, regardless of the extent or cause of its noncompliance.[7] *See Andrus v. Glover Construction Company*, 446 U.S. at 616-17.

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[6] The government maintains, Gov. Br. 18, and respondents agree, that the statute's general suppression provision (18 U.S.C. §2518(10)(a)) does not apply to a delay in judicial sealing of electronic surveillance tapes. Thus, either the specific exclusionary language of §2518(8)(a) applies to unexcused delays in sealing or else there is no statutory remedy for such violations.

[7] Indeed, the government's interpretation would also render the satisfactory explanation requirement of §2518(8)(a) virtually meaningless. If all that the government must do to avoid

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The government's tortured construction of §2518(8)(a) would produce absurd results antithetical to the legislative intent of the statute. If, as the government maintains, compliance with the immediate sealing requirement is not a prerequisite for admissibility, that statutory directive can be blithely ignored with impunity. According to the government, §2518(8)(a) does not preclude the admission of Title III recordings as long as some seal is affixed on or before the date such recordings are offered into evidence. No matter how protracted the delay or how lame the government's excuse for noncompliance, all would be forgiven and made right through a belated sealing ceremony. Such an interpretation would transform the immediate sealing requirement into a toothless admonition and undermine the legislative purpose of reducing the opportunities for tampering with electronic surveillance recordings. Such an absurd result, which clearly contravenes congressional intent, should not be imputed to the statute. *See United States v. Turkette*, 452 U.S. at 580.

The nature, purposes, and history of Title III lend further support to respondents' position that unexcused noncompliance with the immediate sealing requirement carries the consequence of evidentiary exclusion under

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exclusion of late-sealed tapes is to get those tapes sealed at some point before offering them into evidence, it need never bother to explain its failure to fulfill the statutory requirement. That cannot be what Congress had in mind in carefully crafting the provisions of Title III.

§2518(8)(a). Both Congress and this Court have emphasized that the specific requirements enumerated in Title III are to be strictly enforced. Senator McClellan, the statute's chief sponsor in the Senate, remarked during legislative debate:

> [A] bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't' . . . .
>
> 114 *Cong. Rec.* 14751 (1968).

In his concurring opinion in *United States v. Donovan*, 429 U.S. 413, 441 (1977), Chief Justice Burger described the statute as having been drafted "with exacting precision." Earlier, in *United States v. Giordano*, 416 U.S. at 505, 515 (1974), Justice White, writing for the majority, noted the "considerable detail" in Title III, evincing the "clear intent" of Congress that electronic surveillance be used with restraint. In *United States v. Chavez*, 416 U.S. 562, 580 (1974), this Court admonished the government to maintain "strict adherence" to the requirements of Title III. Viewed against this backdrop, the government's current reading of §2518(8)(a), which would divorce the immediate sealing requirement from the express enforcement mechanism set forth within the very same subsection, appears particularly strained and implausible.

Since the government's peculiar interpretation of the sealing provision is belied by its plain language and the application of settled rules of statutory construction, it is hardly surprising that no court which has construed § 2518(8)(a) shares the government's view. Indeed, every single court which has addressed the issue to date has agreed that an unexplained delay in sealing must be treated as equivalent to an absent seal for purposes of

§2518(8)(a). *E.g. United States v. Mora*, 821 F.2d at 864-865 (government's interpretation would lead to "outlandish results" and would be "tantamount to urging law enforcement to go through the essentially empty charade of making returns hopelessly out of time in order to thwart what Congress, in enacting § 2518(8)(a), manifestly intended to accomplish"); *United States v. Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982).[8]

Close scrutiny of the government's effort to eviscerate the immediate sealing provision of Title III by jettisoning its enforcement mechanism reveals it to be based upon nothing more than a bald assertion that excluding late-sealed tapes amounts to poor public policy. Gov. Br. 18-20, 22-24. In effect, the government is asking this Court to rewrite §2518(8)(a) under the guise of "construing" the statute in order to better serve the government's own objectives. Such an argument is offensive to the separation of powers which undergirds our political system. As this court observed in *T.V.A. v. Hill*, 437 U.S. 153, 197 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the

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[8] Other courts have implicitly rejected the government's vacuous position, by holding that a satisfactory explanation existed for late-sealed tapes. *E.g. United States v. Diana*, 605 F.2d 1307 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *United States v. Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). Had any of these courts adopted the government's approach, the issue of satisfactory explanation need never have been reached.

> process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

In fact, the immediate sealing requirement and accompanying exclusionary provision of §2518(8)(a) do serve the intent of Congress by significantly reducing the opportunities for tampering and by helping to protect the integrity of Title III recordings. The point of the provision is to put such tapes under direct judicial supervision as quickly as possible, thus reducing the risk of tampering. It is self-evident that the longer such tapes remain outside the purview of judicial supervision via sealing, the greater the danger of adulteration. *United States v. Mora*, 821 F.2d at 868. Immediate judicial sealing acts as a readily-enforceable, prophylactic safeguard against improper editing or other alteration of electronic surveillance tapes. *United States v. Johnson*, 696 F.2d at 124; *United States v. Gigante*, 538 F.2d at 505.

Yet even if the government's critique of §2518(8)(a) were well-founded, its frontal assault on the plain language and meaning of the statute would not belong in this or any other court. The government is free to propose modifications of the sealing provision of Title III to Congress, which enacted the statute in 1968. Unless and until Congress sees fit to amend this carefully crafted legislation, however, it should be interpreted in accordance with its plain language and applicable principles of statutory construction, and enforced as such. This Court should affirm the court below in holding that compliance with the immediate sealing requirement is a prerequisite for the evidentiary use of Title III recordings.

II. THE STATUTE MANDATES EXCLUSION OF LATE-SEALED TAPES WHEN THE GOVERNMENT PROVIDES NO SATISFACTORY EXPLANATION FOR ITS VIOLATION, WHETHER OR NOT THERE IS PROOF OF TAMPERING.

The second dispute between the parties respecting the proper construction of §2518(8)(a) is over the meaning and application of the sole enumerated exception to the statutory exclusion of late-sealed tapes. According to the express terms of the statute, a "satisfactory explanation" by the government for its noncompliance renders the exclusionary provision inapplicable. The court of appeals held, and respondents agree, that this excusatory phrase requires the government to justify its tardiness in submitting Title III recordings for judicial sealing, based upon the totality of the circumstances, in order to avoid exclusion. Pet. App. 12a. The government disagrees, maintaining that evidence which persuades a reviewing court that late-sealed tapes have not been tampered with should necessarily be deemed to constitute a satisfactory explanation under §2518(8)(a), regardless of the duration of delay or why it occurred. Gov. Br. 24-25.

A. The Plain Language of the Statute and Established Principles of Statutory Construction Compel Rejection of the Government's Argument.

The short answer to the government's position that evidence of tape integrity is the equivalent of a "satisfactory explanation" for failure to comply with the immediate sealing requirement is that that is not what the statute

says. The statute explicitly requires "a satisfactory explanation for the absence" of an immediate judicial seal. The statute calls upon the government to explain its reasons for noncompliance, without regard to the authenticity of the tapes. If Congress had meant to say that tapes need not be excluded for violations of the immediate sealing requirement absent proof of tampering, it could easily have explicitly enacted such an additional exception. Instead, Congress legislated only one means for the government to avoid exclusion of late-sealed tapes—by providing a satisfactory explanation for noncompliance. The government's attempt to rewrite the statute under the guise of construing its clear language should be rejected.[9]

Even if the statutory language were ambiguous, the application of settled rules of statutory construction would compel the same result. In essence, the government's argument is that absent evidence of actual tampering, a violation of the immediate sealing requirement amounts to harmless error, not warranting the consequence of evidentiary exclusion. This policy argument utterly ignores the fact that Congress reached a contrary conclusion by electing to include an express exclusionary rule within the sealing provision of Title III. *See Russello*, 464 U.S. at 23.

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[9] The government here expounds a novel approach to statutory construction, arguing that it was "inappropriate to create a rule" such as that explicitly embodied in §2518(8)(a). Gov. Br. 23. Such a decision, of course, is within the exclusive purview of Congress. *T.V.A. v. Hill*, 437 U.S. at 197.

Moreover, the government's position violates the principle that where Congress enumerates a specific exception to a general rule, additional exceptions are not to be implied absent clear legislative intent. *Andrus v. Glover Construction Co.*, 446 U.S. at 616-617. Here, Congress provided the government a specific means of avoiding the harsh result of evidentiary exclusion--proof of a satisfactory explanation for noncompliance with the immediate sealing requirement. The government now seeks to add a second escape route--proof of tape integrity. The statute contains no such provision, and the government offers no evidence that Congress intended that one be imputed.

Finally, the government's "construction" of §2518(8)(a) would essentially strip that statutory provision of its substance and function. The government argues that evidence of the satisfactory explanation required by the statute is equivalent to the evidence which must be presented by the proponent of any real evidence under Rule 901 of the Federal Rules of Evidence. Gov. Br. 19-20. Of course, no real evidence may be admitted at trial unless its authenticity or integrity can be established. If that is all Congress meant in adding an exclusionary provision to the sealing subsection of Title III, however, that provision would be entirely superfluous. The government's argument would relegate Title III recordings to the status of any other real evidence

offered at a trial.[10] Yet Congress devoted a detailed, comprehensive statute to the regulation of electronic surveillance alone, including a specific provision requiring immediate judicial sealing and mandating exclusion for noncompliance, in the absence of a satisfactory explanation. The government's attempt to reduce that provision to a nullity should be rejected.

B. The Function of §2518(8)(a) as a Readily-Enforceable Means of Reducing the Risk of Tape Tampering Would be Undermined by the Government's Interpretation.

In establishing a requirement of immediate judicial sealing backed by an exclusionary provision for noncompliance, Congress did not completely eliminate the possibility that electronic surveillance tapes could be tampered with. By limiting the time the tapes are outside judicial supervision, however, the statute reduces the opportunity for, and hence risk of, tampering. *United States v. Donlan*, 825 F.2d 653, 657 (2d Cir. 1987); *Note*, "Evidence – Admissibility of Wiretap Recordings After Delayed Judicial Sealing," 22 SUFFOLK U.L. REV. 218, 227 (1988). Indeed, even the government concedes that "[a] lengthy delay

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[10] Prior to the passage of Title III, numerous decisions required the government to establish the authenticity of any tape recording offered into evidence. *E.g. United States v. Knohl*, 379 F.2d 427, 439-41 (2d Cir. 1967); *United States v. Madda*, 345 F.2d 400, 402-03 (7th Cir. 1965). In interpreting a statute, it can always be assumed that Congress knew the law, including judicial interpretations, which existed at the time the statute was passed. *Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). Viewed in this context, the government's claim that Congress intended that §2518(8)(a) require only proof of authenticity, *i.e.*, the integrity of the tapes, is unsupportable.

[in sealing] may increase the opportunity for alteration . . . ." Gov. Br. 24. Like a traffic light installed at a dangerous intersection, the sealing requirement serves a valuable prophylactic function, whether or not disaster ensues on any particular occasion.

The government's proposal that late-sealed tapes be deemed admissible absent proof of actual tampering would effectively replace a readily-enforceable, external requirement with an evidentiary contest over tape integrity. Such a drastic shift in emphasis, predicated upon neither the language of the statute nor its legislative history, ignores the technical feasibility of tape tampering as well as the substantial practical obstacles to detecting such alterations. In the name of public policy, the government would needlessly and unjustifiably transform the nation's trial courts into stages for expensive, protracted, and inconclusive battles among audio engineers and other technical experts.

The mechanics of recording conversation or other sounds onto magnetic tape are neither novel nor particularly complicated. A signal transducer, usually a microphone, is employed to convert an acoustic signal electromechanically into an electrical signal.[11] Weiss and

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[11] Much of the technical information set forth in this portion of respondents' brief is derived from a study by the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. Weiss and Hecker, "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," published in *Commission Studies* (1976). The Commission, which was established by Congress in

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Hecker, *supra*, at 227. A transmitter or other intervening device processes the electrical signal into a "record signal." *Id*. That signal is then captured and preserved on magnetic tape through the medium of a tape recorder. *Id*.

While the creation of tape recordings is readily accomplished, so is the falsification of such tapes. Tape recorded evidence is "uniquely susceptible to manipulation and alteration." *United States v. Gigante*, 538 F.2d at 505. *See also Lopez v. United States*, 373 U.S. 427, 468 (1963) (Brennan, Douglas, and Goldberg, JJ., dissenting) ("Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery"). As Weiss and Hecker observe:

> Tapes that are made for use in criminal investigations can be falsified, even by relatively unskilled persons, in ways that are superficially convincing. The necessary equipment is readily available, and the necessary techniques are easily learned.

Weiss and Hecker, *supra*, at 237. They conclude that "[i]t appears to be impossible to prevent tampering with tapes." *Id*. at 238.

There are four basic varieties of tape falsification: deletion, obscuration, transformation, and synthesis. *Id*. at 222. Deletion includes editing the contents of a tape by

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§804 of Title III, 82 Stat. 223-25, filed its final report with Congress in 1976. The study by Weiss and Hecker has been described as "an exhaustive survey of the art concerning the authentication of magnetic tapes for legal purposes." *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982).

erasure, splicing, or similar means. A skillful forger can avoid telltale signs of such editing. *Id*. at 223. Obscuration involves the weakening or distorting of recorded material. According to Weiss and Hecker, "[i]f it is done well, falsification involving obscuration is much more difficult to detect and prove than falsification involving deletion." *Id*. Transformation is a type of tampering whereby portions of a recording are changed or rearranged to alter the meaning of the recorded material. *Id*. at 224. The fourth variety of tampering, synthesis, involves the generation of a recording that is "wholly artificial." *Id*. According to Weiss and Hecker, "[i]t is relatively easy to add background noises to an existing speech recording and thereby alter the apparent circumstances under which it was made." *Id*.

Most tape recordings manifest certain irregularities which may be attributed either to tampering or to an entirely innocent cause. *Id*. at 237. Tapes may contain "gaps," "transients," "fades," "equipment sounds," "extraneous voices," and other "information inconsistencies." *Id*. at 220-221. A gap in a recording is a segment in which the character of the recorded material changes abruptly. The gap may be as brief as a thousandth of a second. *Id*. at 220. Transients are abrupt sounds of short duration, usually lasting less than one-tenth of a second. *Id*. A fade is a reduction in the strength of the recording. A recording may also contain other inexplicable sounds, voices, or inconsistencies, which may be suggestive of tampering. *Id*. at 221. It is impossible for a judge or juror, lacking expertise in acoustical engineering, to determine by examining or listening to a tape recording whether or not it has been altered. *Id*. at 218.

A wide array of testing mechanisms has been employed by experts engaged in forensic examination of tapes. They include: (1) use of an oscillograph to provide a graphic record of the electrical signal over time; (2) spectral analysis, revealing the distribution of the playback signal over the audio frequency range; (3) magnetic development, measuring the distribution of magnetic field variations of the tape; (4) flutter measurements, measuring the frequency modulation of tones present in background noise; and (5) analysis of magnetic start and stop marks on the tape. *Id.* at 227-231. *See also* "The EOB Tape of June 20, 1972," *Report on a Technical Investigation Conducted for the United States District Court for the District of Columbia by the Advisory Panel on the White House Tapes* (May 31, 1974) at 8-20 (detailed report chronicling the expert examination of the infamous White House tape containing an eighteen-and-one-half minute gap).

Technical limitations often prevent these tests from generating meaningful results. As Weiss and Hecker explain, "[t]he effectiveness of the analytical approach depends almost entirely on the availability of factual information about the acoustic sources, the original signal transducer, the original intervening equipment, the original tape recorder, the original tape, and the original recording." Weiss and Hecker, *supra*, at 233. Where the original components of the recording system are unavailable for examination and details relating to the manner in which that system was operated are unknown, "even the most powerful analysis techniques become inapplicable, and the examination may prove inconclusive." *Id.* at 220. Even where the original components and technical data

are still available for analysis, a forensic examiner typically does not have access to all of the equipment necessary to perform all of the testing desired in a particular case. Instruments capable of performing flutter measurements, for example, are extremely expensive and not generally available. *Id.* at 234.

Most significantly, from the standpoint of a criminal justice system operating with limited human and financial resources, forensic examination of tape-recordings is an extremely time-consuming and expensive task. The testing itself can take weeks and even months. *United States v. Johnson*, 696 F.2d at 124. Evidentiary hearings at which each side's experts present and defend their respective findings can go on even longer. In the instant case, the evidentiary hearings on respondents' motion to exclude the Title III recordings on various grounds commenced on September 1, 1987, and continued, virtually uninterrupted, until May 4, 1988. J.A. 1. Hundreds of thousands of dollars in public funds were expended to pay both the government's and respondents' experts for the time they spent carrying out forensic testing and testifying in court.[12]

Yet even an unlimited expenditure of time and money will probably not produce a definitive expert

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[12] The respondents, all of whom were adjudicated indigent by the district court, were entitled to necessary expert services under the Criminal Justice Act. 18 U.S.C. §3006A(e)(1). Few criminal defendants are likely to possess the financial wherewithal to purchase the services of an acoustical engineer qualified to examine tape recordings for signs of tampering.

opinion that a tape-recording has or has not been tampered with. A well-done forgery may remain undisclosed despite extensive testing. Weiss and Hecker, *supra*, at 225. Most tapes can neither be conclusively authenticated nor shown conclusively to have been falsified. *Id.* at 237. The ease of tampering, coupled with the difficulties of detection and conclusive authentication, renders the courtroom battle between tape experts an inefficient and ineffective means of assuring the integrity of electronic surveillance recordings.

If adopted by this Court, the government's reconstruction of §2518(8)(a) would require trial courts to engage in time-consuming, expensive battles between acoustical experts debating the likely significance of various gaps, marks, and glitches found on electronic surveillance recordings.[13] The instant case provides an instructive example of how unsuited our trial courts are to such contests. After many months of testimony and hundreds of thousands of dollars in expert fees, the most the government's acoustical engineer was able to say in defense of the more than one thousand electronic surveillance tapes proffered by the government was that nine of

[13] If, as the government insists, the sole relevant issue is whether or not tampering has occurred, then it would always be necessary (in any case involving Title III tapes not immediately sealed) to provide indigent defendants with the expert resources required to test electronic surveillance tapes for tampering and to expend significant judicial resources to adjudicate the facts in dispute. The economic and institutional costs inherent in such a process are virtually incalculable. If defendants are to be denied such expert services, they will be unable to test the authenticity of the government's recordings. That would reduce the "contest" over tampering to a sham, formalistic ceremony with a pre-ordained result.

the ten he looked at appeared to be authentic. The expert, Ernest Aschkenasy, explicitly refused to extrapolate from his findings regarding nine tapes to the authenticity of the remaining tapes. J.A. 63-64. The trial court declined to make any findings regarding the integrity of the Levittown tapes at issue here. Pet. App. 30a, n.3.

It would be illogical, at the very least, to presume that Congress explicitly established a readily-enforceable requirement of immediate sealing to safeguard the integrity of electronic surveillance tapes and then implicitly authorized the substitution of a costly, protracted, inconclusive battle of expert witnesses. It is precisely because the opportunity for tampering is so great and detection so difficult that the immediate sealing requirement and its accompanying exclusionary provision must be enforced according to its terms, regardless of whether or not actual tampering can be shown. *United States v. Massino*, 784 F.2d at 156.

In enacting Title III, Congress gave the government license to employ electronic surveillance as an investigative tool, subject to carefully-prescribed limitations and procedures. That license carries with it a commensurate responsibility—to strictly comply with the key provisions of Title III. The timely sealing of tape recordings in compliance with §2518(8)(a) is readily accomplished by a competent prosecutor. Where the government fails to fulfill that explicit statutory obligation and can provide no satisfactory explanation for its failure to do so, the tapes must be excluded. That statutory remedy fulfills the purpose of Congress in limiting the opportunity for tampering and safeguarding the integrity of electronic surveillance recordings, without interfering in any way

with the government's ability to employ electronic eavesdropping as an effective law enforcement weapon.[14]

C. Contrary to the Government's Claims, The Enforcement of §2518(8)(a) According to its Terms Does Not Produce Unreasonable or Perverse Results.

The government suggests that if the immediate sealing requirement and its accompanying exclusionary provision are enforced according to its terms, the system of criminal justice will suffer. Gov. Br. 22-23. Yet §2518(8)(a), as enacted, contains an escape clause which permits the government to introduce its late-sealed tapes into evidence as long as it can provide a satisfactory explanation for its tardiness. In practice, the lower courts have been quite generous in approving a wide bevy of excuses put

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[14] The government's argument that its reformulation of the excusatory provision of §2518(8)(a) better serves the purposes of Title III is not only specious, but also beside the point. As this Court recently observed:

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." '
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> *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (citations omitted).

forward by the government in different circumstances. *E.g. United States v. Mora*, 821 F.2d at 870 (20 and 41-day delays do not mandate suppression; state prosecutor preoccupied with unrelated trials and failed to understand responsibilities); *United States v. Robinson*, 698 F.2d 448, 453 (D.C. Cir. 1983) (*per curiam*) (four-day delay; government's explanation sufficient where reason offered was need to duplicate tapes and perform other wiretap responsibilities in same case); *United States v. Massino*, 784 F.2d at 156 (15-day delay; government's decision to investigate leak of confidential information in same case constitutes satisfactory explanation). Indeed, the exclusion of late-sealed tapes has been upheld on appeal in only one case, other than this one, since Title III was enacted in 1968. *United States v. Gigante*, 538 F.2d at 507. It is only the extreme case, like this one, which triggers the exclusionary remedy built into the statute.[15]

The lower courts which have carefully analyzed the satisfactory explanation requirement have applied a flexible, broad-based test, taking into account the totality of circumstances in determining whether or not the government's explanation for noncompliance with the immediate sealing requirement should be deemed "satisfactory." In analyzing why the government failed to comply with the immediate sealing requirement, these courts have assessed a number of factors, including: the duration of

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[15] Under the government's interpretation, late-sealed tapes would *never* be subject to exclusion under §2518(8)(a), no matter how many months or years the tapes remained unsealed and regardless of whether the tardiness came about deliberately or in bad faith.

delay; the diligence of law enforcement in completing the pre-sealing tasks; the frequency (in a case involving multiple wiretap orders) of violations of the immediate sealing requirement; the nature of the circumstances, if any, which diverted those responsible from the presentation of the tapes for immediate sealing; evidence of any prejudice caused to defendants by the delay in sealing; and evidence of any bad faith by the government. *See, e.g., United States v. Rodriguez*, 786 F.2d 472, 477 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d at 124-125.[16]

Such a standard provides an appropriately flexible vehicle for applying the provisions of §2518(8)(a) in each particular case. There is no basis, in law or in logic, for replacing this broad set of criteria with the time-consuming, costly, and inconclusive debate over tampering proposed by the government.[17]

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[16] Not all of the above factors are always relevant, nor is the list above all-inclusive. For example, affirmative evidence of tampering present in a particular case could shed light on the government's actual motive for noncompliance. While tampering is typically listed as a factor to consider, the totality of the circumstances approach affords the lower courts the discretion to first consider the government's reasons for delay, without resorting to the costly and inconclusive battle of the experts required by the government's approach.

[17] Respondents recognize that several courts of appeals have addressed the issue of tampering in ruling on the exclusion of late-sealed tapes. *E.g. United States v. Diana*, 605 F.2d 1307, 1314-1316 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *United States v. Falcone*, 505 F.2d 478, 484 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States v. Sklaroff*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); *United States v.*

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Yet even if the explicit exclusionary remedy set forth in the statute could be debated on policy grounds, the government's position on that issue is entirely irrelevant to the proper construction of the statute. *See Rodriguez v. United States*, 480 U.S. at 525-26. The Court is addressing a legislative provision here, not a judicially-crafted rule of exclusion. The only lawful vehicle for changing that provision is via legislative enactment. *See T.V.A. v. Hill*, 437 U.S. at 194-95. The government's bald suggestion that the plain language of the statute be blithely ignored would violate the constitutional doctrine of separation of powers and must be rejected.

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Angelini, 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). None of these courts, however, resort to the "tampering only" inquiry now espoused by the government. In *Diana*, the court relied on factors other than tape integrity in deeming the government's explanation to be satisfactory, 605 F.2d at 1315. In *Falcone*, the court erroneously looked to §2518(10)(a), rather than §2518(8)(a), for legal guidance. Moreover, the Third Circuit did not suggest that factors other than tampering are irrelevant. 505 F.2d at 483. Both of these decisions contain well-reasoned dissents. 605 F.2d at 1316 (Hall, J.); 505 F.2d at 486 (Rosenn, J.). In *Sklaroff*, the Court found (1) no prejudice to the defendants, (2) the existence of an administrative explanation for the 14-day delay, and (3) no showing of any tampering. 506 F.2d at 840. Finally, in *Angelini*, the Seventh Circuit applied a two-step analysis, *i.e.*, the first inquiry is whether a satisfactory explanation is shown, and the second is an examination of the integrity of the tapes. To the extent that these decisions could be read as focusing on tape integrity as a substitute for a satisfactory explanation, they find no support in the language of the statute or governing principles of statutory construction.

III. THE GOVERNMENT'S EXPLANATION FOR ITS FAILURE TO COMPLY WITH THE IMMEDIATE SEALING REQUIREMENT WAS NOT SATISFACTORY.

A. The Levittown Orders.

After weighing the totality of relevant circumstances, the court of appeals concluded that the government's explanation for its protracted delay in sealing the Levittown tapes was unsatisfactory. "The failure to seal the Levittown tapes here," the court found, "resulted from a disregard of the sensitive nature of the activities undertaken . . . ." Pet. App. 12a. A review of the evidentiary record supports the lower court's finding and compels affirmance of the exclusion order.

The explanation for late sealing offered by the government was the putative belief of Supervisory Attorney Frank Bove that judicial sealing could be deferred until there was some "meaningful hiatus" in the government's overall use of electronic surveillance in the course of investigating these defendants.[18] J.A. 5. Since Bove claimed that all such electronic surveillance, irrespective of targets or location, was "interrelated and part of the same investigation," J.A. 4, he felt free to put off sealing the tapes recorded at the Levittown location as long as eavesdropping elsewhere was authorized or in

[18] In his sworn affidavit, Bove stated his belief that judicial sealing could be deferred as long as the government had *legal authority* to conduct electronic surveillance at some location. J.A. 5. When he testified, he modified his position, stating that he believed the government was not obligated to seal Title III recordings as long as it had the *physical capability* to conduct eavesdropping at some location. J.A. 25-26.

progress.[19] Bove's decision to postpone sealing was thus deliberate, and not due to oversight or accident.

Bove acknowledged that there was no legal authority extant in 1984 supporting his novel interpretation of the sealing requirement. J.A. 41. Indeed, all such authority was to the contrary. *E.g. United States v. Vasquez*, 605 F.2d 1269 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979); *United States v. Angelini*, 565 F.2d at 470. Bove testified that he referred to a number of documents in formulating his sealing theory, including the statute itself, a Department of Justice monograph prepared by Attorney William Corcoran, materials published in the *Georgetown Law Journal* and a treatise by Fishman entitled *Wiretapping and Eavesdropping*. J.A. 23-24, 35. Bove conceded, however, that none of these sources supported his sealing theory, and admitted that the section of the Fishman treatise dealing with sealing was directly to the contrary. J.A. 40-43. When confronted with this conflict, and asked if he had read the section, Bove testified: "I don't recall specifically. Apparently not, or else I would have given some second thoughts as to what I did." J.A. 43.

As the Justice Department attorney in charge of the Title III operation, Bove had a professional obligation to

[19] Bove's theory was exemplified by the following testimony:

> Q: If you had had continuing authority and capacity to intercept from April 27, 1984, through and including August 30, 1985, no sealing would have been required prior to August 30, 1985, correct.
>
> A: Yes.
>
> (10/27/87 Tr. 194).

ascertain the requirements of law respecting the sealing of recorded tapes. If Bove was not sure what immediate sealing meant, he should have consulted the considerable body of relevant caselaw, all of which directly contradicted his own legal theory about sealing. He should have consulted with his colleagues in the Department of Justice, many of whom had experience in Title III investigations and were presumably aware that §2518(8)(a) meant what it said, even if Bove was not. Indeed, he should have read the Fishman treatise, which he claims to have looked at, but which flatly rejects his purported justification for postponing the sealing of the Levittown tapes. Bove took none of these elementary steps to perform his important job.

His decision to rely upon his novel and legally-unsupported theory as to when sealing could properly be accomplished can fairly be characterized as a deliberate decision to ignore the law. In the criminal arena, such deliberate ignorance is generally deemed equivalent to actual knowledge of illegality. *E.g. United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir. 1986); *United States v. Hanlon*, 548 F.2d 1096, 1101 (2d Cir. 1977). Bove's conduct fell far short of what is minimally required by law. Willful disregard of the requirements of law, especially by a public official, cannot be rewarded with the appellation of "satisfactory explanation." As the Court of Appeals wryly observed:

> The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law.
>
> Pet. App. 12a.

To credit the government's flimsy excuse for the egregious sealing delay in this case would be to sanction an unacceptably low standard of conduct for government attorneys supervising extremely sensitive investigations.

Faced with the clear inadequacy of Bove's "explanation" for failing to seal the Levittown tapes for some three months, the government has resorted in this Court to mischaracterizing the record in an effort to substitute a more palatable excuse. In its brief, the government claims that Bove "believed that sealing was not legally required until all the related interception orders and extensions *for each target* were completed" (emphasis supplied). Gov. Br. 26. In addition, the government alleges that Bove concluded that the authorizations for the Levittown interceptions were "extended," thus justifying his decision to "postpone" sealing the tapes. *Id.* This rewriting of the record enables the government to argue that "the question Bove faced was whether the El Cortijo order was an 'extension' of the Levittown order," within the meaning of §2518(8)(a).[20] *Id.* at 27.

Whatever possible merit could be ascribed to this hypothetical extension theory for delaying the Levittown sealing, it was never adopted by Bove. As detailed above, Bove claimed to believe judicial sealing could be put off as long as electronic surveillance was authorized or proceeding at *any* location in the course of the overall investigation. He never purported to base his deliberate decision upon a belief that the El Cortijo/Taft Street

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[20] The government concedes on this appeal that the El Cortijo surveillance order was not, in fact, an "extension" of the Levittown order. Gov. Br. 26, n.18.

eavesdropping order constituted an "extension" of the Levittown orders within the meaning of §2518(8)(a).[21]

Indeed, the government never even claimed below that Bove believed the El Cortijo order was an "extension" of the Levittown orders. Gov. D.Ct. Br. 97; Gov. C.A. Br. 18. Rather, the government made the *legal* argument that the El Cortijo surveillance should be deemed an extension of Levittown. Gov. C.A. Br. 19-28. It is that legal argument, rejected by the courts below and now abandoned by the government, Gov. Br. 26, n.18, that has somehow been transformed into the imaginary *factual* underpinning of the government's most recent explanation for late sealing.

The court of appeals properly analyzed the satisfactory explanation issue in terms of the testimony of the government prosecutor who made the sealing decision, rather than on the basis of a legal argument first made by government attorneys four years later. Pet. App. 12a. The evidence in the record strongly supports the ruling below that the explanation given was not satisfactory. The only excuse put forward by Bove for the delay in sealing the Levittown tapes was his ill-conceived theory. There is no

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[21] Thus, the government's discussion of *United States v. Principie*, 531 F.2d 1132, 1142 and n.14 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977), is entirely inapposite. There is no evidence in the record that Bove even read the case, much less relied on it. Neither it nor any other reported case, treatise, or manual supports in any way Bove's ill-conceived claim that all orders in a multi-location electronic surveillance operation are interrelated for sealing purposes.

evidence that the delay was caused by shortages of personnel, administrative obstacles, or unanticipated emergencies. There is and was no legal support for Bove's theory. Thus, it cannot be considered objectively reasonable.

The shortcomings of the government's explanation for sealing the Levittown tapes some three months too late are compounded by other government misfeasance which characterized the investigation in this case. Apart from the late-sealed Vega Baja telephone tapes, discussed at pp. 37-40, *infra*, the record reveals that Title III recordings obtained from a number of other locations were also sealed late. *E.g.* Pet. App. 75a (19-day delay in sealing Taft Street tapes; 19-day delay in sealing El Cortijo tapes); Pet. App. 79a (15-day delay in sealing Vega Baja residence and remaining telephone tapes); Pet. App. 92a-93a (14-day delay in sealing El Centro tapes). Thus, the particular delays which resulted in exclusion of the recordings at issue here were merely the most egregious instances of noncompliance, rather than isolated peccadilloes. Indeed, the government was fortunate that the district court applied the satisfactory explanation standard leniently and agreed to admit the remaining late-sealed tapes into evidence. The order of the district court, excluding the Levittown tapes, upheld by the court of appeals, should be affirmed.

B. Vega Baja Telephones.

The only Vega Baja recordings excluded below were those created pursuant to a judicial order which expired by its terms on February 17, 1985. Those tapes were

sealed on June 15, 1985, 118 days later.[22] The government offered two explanations for this protracted delay. First, as with the Levittown tapes, Supervisory Attorney Bove claimed he believed he could defer sealing as long as electronic surveillance was going on elsewhere. J.A. 6-7, 27-28. Second, the government claimed that the hiatus between the expiration of the first Vega Baja wiretap order on February 17 and the issuance of a subsequent order on March 1 was necessitated by the decision to "extensively expand and revise the affidavit that was to

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[22] As the court of appeals pointed out, a central issue with respect to the Vega Baja tapes is whether the government satisfactorily explained its failure to seal between February 17 and March 1, 1985. Pet. App. 14a. While the delay in sealing was 118 days in duration, the government's principal transgression was in failing to seek an extension order for twelve days after its initial wiretapping authorization expired. That period of delay in seeking an extension order contrasts markedly with the three months the government avoided sealing the Levittown tapes.

In reviewing the totality of the circumstances, however, the court of appeals had before it evidence that Bove had relied on his unsupportable legal theory that interrelated orders in this investigation delayed the sealing requirement (*see* pp. 33-39, *supra*), and had also proffered a factually inaccurate excuse for his late sealing of the Vega Baja tapes—the preparation of a revised and expanded affidavit in support of continued wiretapping. J.A. 6-7; Pet. App. 14a. The court also properly considered the Vega Baja sealing delay as part of a pattern of such delays in this investigation, reflecting the government's insensitivity to the importance of complying with this specific requirement of Title III. Those additional factors buttress the decision of the court of appeals to affirm the exclusion of the Vega Baja tapes, as well as those recorded at Levittown.

accompany the application for renewal." J.A. 7. Both of these excuses were properly rejected by the courts below.[23]

As demonstrated above, Bove's fanciful deferral theory of judicial sealing was completely devoid of legal support. He utterly failed to undertake basic steps to ascertain and apply the relevant law in carrying out his responsibilities to supervise this sensitive investigation. Under the circumstances, the court of appeals' conclusion that the delay in sealing the Vega Baja tapes stemmed from "an underlying cavalier conception that the sealing requirements are technical, rather than reflective of Congressional concerns about underlying constitutional requirements," Pet. App. 14a, was clearly warranted. The government's second explanation for late-sealing was equally deficient. While Bove's affidavit asserted that the "revised and expanded affidavit was presented to Chief Judge Perez Gimenez on March 1, 1985," J.A. 7, the government was compelled to concede in the court of appeals that the revised and expanded affidavit was not, in fact, submitted until March 31, 1985. Gov. C.A. Br. 9-10. Thus, the government's alternative excuse for its lengthy delay in sealing the Vega Baja wiretap tapes at issue here

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[23] Unfortunately, in seeking to buttress its argument, the government once again mischaracterizes the record in this case, by erroneously claiming that both courts below agreed that the March 1, 1985 order was an "extension" of the earlier order. Gov. Br. 28. In fact, exactly the contrary holding was made by both lower courts. Pet. App. 83a ("the Court does not view the March 1, 1985 order as an extension of the January 18, 1985 order"); Pet. App. 14a ("we agree with this conclusion . . . ").

must be deemed unsatisfactory. The decision of the lower courts to exclude those tapes should be affirmed.

IV. NUMEROUS CIRCUMSTANCES SURROUNDING THE F.B.I.'S INVESTIGATION IN THIS CASE CAST DOUBT UPON THE VERACITY OF THE GOVERNMENT'S EXPLANATIONS FOR LATE SEALING.

As demonstrated above, the government's proffered excuses for late sealing, even if believed, are unsatisfactory, and were properly rejected by the court of appeals. Yet, the veracity of those *post hoc* excuses is itself open to substantial doubt. The government's widespread overreaching during its electronic surveillance investigation, including use of a secret recording system and intentional violations of Title III and court orders, all demonstrate a contempt for the rule of law.[24] The court of appeals,

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[24] It is also relevant to examine the government's asserted excuses in the context of the history of Puerto Rico and the relationship between the F.B.I. and the Puerto Rican independence movement. Since Puerto Rico was deprived of its sovereignty and converted into a U.S. colony in 1898, an ongoing campaign of repression against independence parties and organizations has been carried out. Moreover, an extensive program of political surveillance of independence activities, coupled with a formal F.B.I. counter-intelligence program, has been thoroughly documented. *See "Informe – Discrimen y Persecucion Por Razones Politicas: La Pratica Gubernmental De Mantener Listas, Ficheros y Expedientes De Ciudadanos Por Razon De Su Ideologica Politica"* (Report by Commission of Civil Rights, Commonwealth of Puerto Rico: "Discrimination and Persecution for Political Reasons: The Governmental Practice of Maintaining Lists, Files and Dossiers of Citizens for Ideological Political Reasons"). This Report is a Commonwealth of Puerto

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which accepted the government's explanations at face value and found them wanting, had no need to address these additional matters in excluding the tapes pursuant to §2518(8)(a).

A. The Government's Use of Bootleg Cassettes.[25]

For a period of almost two years preceding the arrest of the respondents, numerous F.B.I. agents were engaged in a political intelligence-gathering operation against suspected Puerto Rican independence activists, including

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Rico government study prepared in 1989 as a result of the disclosure that secret political dossiers were being maintained by the Puerto Rican police regarding pro-independence sympathizers labelled as "subversives." It provides extensive documentation of the history of political spying on pro-independence Puerto Ricans. *See also* Nelson, *Murder Under Two Flags: United States, Puerto Rico and the Cerro Maravilla Cover-Up* (1986); Gautier-Mayoral, "Notes on the Repression Practiced by the U.S. Agencies in Puerto Rico," 52 REV. JUR. U.P.R. 431 (1983). The ongoing nature of these activities was underscored by the revelation in 1988 that files had been maintained on over 130,000 alleged "subversives" who were believed to be sympathetic to the cause of Puerto Rican independence. Doctors, lawyers, teachers, trade unionists, students, and every defense attorney originally appointed in this case—many of whom had no prior contact with Puerto Rico until their appointment to represent these indigent defendants—had so-called "subversive" files maintained on them. Commission Report, pp. 266-380.

[25] The term "bootleg cassettes," used to describe cassette recordings created outside the parameters of Title III and not judicially authorized or sealed, is derived from the *Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (Minority Report) (1976), p. 182.

suspected members and supporters of Los Macheteros, a political organization which seeks to challenge the military, economic, and political control over the island and people of Puerto Rico by the United States government. During the course of the electronic surveillance in this case, the F.B.I. admittedly recorded several thousand hours of conversations, much of which was totally irrelevant to any criminal investigation. Many of the recordings include highly personal and private communications between parents and their children, conversations in bedrooms and bathrooms, and other matters which the government had no legitimate reason to record.[26]

The more than one thousand reel-to-reel tapes eventually sealed by the government in this case do not reveal the full extent of its electronic surveillance. In addition, the F.B.I. simultaneously employed a secret, independently-operated cassette recording system along with its

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[26] The political character of the government's agenda was further exemplified by the scope of the search warrants obtained by the government and executed at various locations throughout Puerto Rico in conjunction with respondents' arrest on August 30, 1985. While respondents were charged only with offenses relating to a specified robbery, the search warrants were framed in terms of seditious conspiracy, enabling the F.B.I. to seize every available scrap of information about the activities and beliefs of pro-independence advocates in Puerto Rico and their sympathizers. Under the rubric of "terrorist training manuals," the F.B.I. seized such documents as a speech by Pope John Paul II and a U.S. Congressional report on the Caribbean Basin Initiative. Poems, paintings, love letters, and music cassettes were taken as well. In preparation for these massive searches and arrests, the F.B.I. brought in agents from the F.B.I. "behavioral science unit" to develop "psychological profiles" of the targets, for which the agents gathered data on the personality traits and habits of the respondents.

reel-to-reel recorders. This additional eavesdropping system could and did record conversations which did not appear on any of the corresponding "original" or "duplicate original" reel-to-reel tapes.[27]

The cassette recording system had never been described to or approved by the judge supervising the Title III interceptions in Puerto Rico, United States District Court Chief Judge Perez Gimenez. 9/1/87 Tr. 252. Moreover, its existence was deliberately concealed from defense counsel and the trial court for two years after the arrests of the respondents.[28] It was finally revealed in

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[27] Special Agent Monserrate, the F.B.I. technical agent who set up the equipment, testified that the cassette recorders, separately wired to the listening devices, could record conversations even when the reel-to-reel machinery was off or "minimized," as long as the "tape/input" switch on the reel-to-reels was in the "input" position. 10/20/87 Tr. 232.

[28] On at least three occasions during the pretrial proceedings, the government took steps to conceal this separate system. First, in a memorandum dated May 2, 1984, Supervisory Agent Arthur Balizan referred to "work cassettes"; the prosecution withheld this document during two years of pre-trial discovery and revealed it only after Case Agent Jose Rodriguez revealed the existence of the secret taping system on September 1, 1987. Second, on February 26, 1986, the prosecution filed a Supplemental Response to a defense discovery request. The prosecution there acknowledged the use of cassette recorders to record conversations occurring during reel changes ("A" tapes), Def. Exh. 2416, but deliberately omitted the fact that the cassette recorders operated independently of reel-to-reel recorders and were used to record original conversations on bootleg cassettes. Finally, in October 1986, Technical Agent Monserrate prepared a draft Supplemental Response to a defense discovery request, which candidly referred to a "working copy cassette recorder" used in the surveillance operation.

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open court by the F.B.I. case agent on the first day of the electronic surveillance hearings.[29]

Unlike the reel-to-reel recordings, which the government claims to have preserved, labelled, and eventually judicially sealed, most of the bootleg cassettes were intentionally destroyed by the F.B.I., either by re-using them or by putting them through a bulk eraser. Def. C.A. App. 49-52.[30] The F.B.I. kept no written records indicating how many of these cassettes had been created, 9/1/87 Tr. 153, or what was recorded on them. 9/1/87 Tr. 101. The F.B.I. inadvertently retained a small number of the cassette recordings. These were finally disclosed to the defense, piecemeal, over a period of months during the Title III hearings.

The government's claim that the cassette recorders were simply used to make "work copy" cassettes, *i.e.*, additional copies of the material recorded on the reel-to-reels for use by the monitors and supervisory agents, is belied by the record. Of the 39 cassettes which were not

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Def. Exh. 2411. The prosecuting U.S. Attorney responsible for the case deleted this reference from the final version which was provided to defense counsel.

[29] Case Agent Rodriguez admitted that the government's widespread use of cassette recorders, ostensibly to make "work cassettes," had been deliberately concealed until that date "to keep questions from being asked about it." J.A. 14-15.

[30] The government did preserve and seal a small number of cassettes, denominated "A tapes," which were made to bridge gaps in conversations while the reels were being changed.

destroyed, four correspond to residence (as opposed to telephone) intercepts.[31] *All* of those residence cassettes contain additional "bootleg" material that does not appear anywhere on the corresponding "original" or "duplicate original" reel-to-reel tapes. Gov. Exh. 379d, f, and g; 439a.[32] It is hardly coincidental that one hundred percent of the retained residence bootleg cassettes, which were never judicially sealed, contain original intercepted communications. In fact, the secret recording system gave the F.B.I. unlimited capacity to intercept private conversations at will, without judicial oversight of any kind.

As the district court ruled, there is no way to determine how many bootleg cassettes contained original material not appearing on any sealed reel-to-reel recording, since virtually all of the cassettes were deliberately destroyed. Def. C.A. App. 62-63. The government's deliberate destruction of these cassettes severely undercut the respondents' ability to challenge the authenticity of the government's tapes, as well as the government's minimization procedures. No court is now able to determine if, and how, the cassettes were used to alter the court-authorized recordings, during the protracted period

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[31] The bootleg cassettes that correspond to telephone interceptions essentially match the corresponding reels. This is not surprising since telephone intercepts, unlike residential intercepts, were rarely minimized.

[32] In addition, two of the sealed "A tapes" for the Levittown residence had previously been used as bootleg cassettes. They too contain additional conversations not recorded on the corresponding reels. Def. C.A. App. 49-62.

preceding judicial sealing.[33] For purposes of this government appeal, the existence of such a supplemental recording system and the repeated attempts to conceal it from respondents and the district court cast doubt upon the government's self-serving excuses for late sealing.

B. Willful Violations of Title III and Court Orders.

On October 20, 1986, during the pretrial proceedings, the government solicited affidavits from the electronic surveillance monitoring agents by means of an "airtel" which informed the agents that "the defense has accused the F.B.I. of illegal arrests, illegal searches, the 'planting' and fabrication of evidence, and illegally intercepting conversations of the defendants, including the monitoring of conversations without recording, tampering of tapes and the erasure of portions of audio tapes." The airtel urged the agents to create a "basis to deny the defense motion to subpoenaing [sic] every agent." Def. Exh. 2385. Most of the monitoring agents submitted the requested affidavits.

The form affidavits provided to the agents for their signatures, signed by virtually all of the surveillance agents, contained representations that the agents "did not

[33] The district court declined to suppress all of the Title III recordings based upon the government's employment of a secret, supplemental cassette recording system. The validity of that ruling was not reached by the court of appeals on this interlocutory appeal. Nevertheless, the existence of such a recording system and the government's attempts to conceal it from respondents and the district court shed light upon the underlying objectives and character of this investigation.

alter, erase, change or tamper with any tape in my possession or control." However, when they took the witness stand, most of the agents admitted to routinely creating and destroying bootleg cassettes. Moreover, several agents admitted to listening without recording, in violation of Title III and the court orders.[34] Particularly striking in this regard was the testimony of Agents Tyler Morgan and Abelardo Alba.

Agent Morgan signed the draft affidavit attached to the October 20, 1986 airtel and had it notarized, but then crossed out his name and the name of the notary because he knew it was false to claim that he recorded all conversations he overheard. 12/4/87 Tr. 63-64. Agent Morgan testified that both he and Agent Alba had intentionally live-monitored in violation of court orders, 12/8/87 Tr. 91-92, and conceded that he "swore falsely" on his affidavit. 12/9/87 Tr. 94. Agent Alba confirmed Morgan's testimony, admitting in his affidavit dated March 16, 1987, that he listened without recording. Def. Exh. 2384-JJJ. Agent Morgan believed agents in addition to Agent Alba were live-monitoring, and he conceded that he would not have live-monitored "without believing that this was the method that others were using to monitor." 12/9/87 Tr. 54. Morgan decided not to report the live-monitoring to any F.B.I. supervisor or prosecutor, hoping

[34] Listening without recording, or "live monitoring," is a practice in which communications are intercepted and overheard by the monitoring agents, but not recorded. Such a practice violates the express requirements of §2518(8)(a) ("The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device").

that it would never be revealed. 12/6/87 Tr. 82-84. He knew that the effect of not telling any higher authority about the practice of live-monitoring was to become involved in a coverup. 12/9/87 Tr. 80-81.

As the testimony of Agents Alba and Morgan revealed, monitoring agents conducting this investigation did, in fact, engage in a practice of eavesdropping without recording, in contravention of Title III and the court orders authorizing electronic surveillance. During the course of evidentiary hearings, respondents presented detailed proof that such live monitoring was carried out on a regular basis.[35] While the district court declined to

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[35] Central to the respondents' proof of live-monitoring was extensive evidence of simultaneous matching of television and radio stations carried out by the monitoring agents at the Levittown and Vega Baja residence sites. A radio and television were connected to a reel-to-reel recorder at each monitoring location to enable the agents to attempt to determine which radio or television station was being played in the target location. Once the agents matched their station with that being overheard, background noise could later be filtered out by the F.B.I. lab. Def. C.A. App. 72-79; 9/10/87 Tr. 69. Monitors were instructed to attempt to match radio and television transmissions each time the recorders were turned on. Def. C.A. App. 79-80.

Respondents presented proof which established that, on numerous occasions, monitors managed to match stations before initiating a spot check. Thus, even though the television channel or radio station within the target residence had been changed since the prior spot check, during a period when agents claimed not to have been listening at all, the agents were miraculously able to select the same station as that of

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exclude all of the Title III recordings based upon this evidence and the court of appeals did not find it necessary to reach the issue of live-monitoring, both the practice and the government's attempt to cover it up provide a revealing context for evaluating the government's explanations for late-sealing.

In light of this record, the government's self-serving excuses for failing to seal its electronic surveillance tapes in a timely manner pursuant to statute should properly be approached with considerable skepticism. The longer judicial sealing was delayed, the greater the opportunity for tampering. To the F.B.I. and the United States government, this was not just another robbery investigation. Rather, it provided a vehicle to investigate, prosecute, and discredit the leadership of a legitimate political movement. Under the circumstances, no credible argument exists that any satisfactory explanation was offered by the government.

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their targets, without checking the surveillance site again. For example, one agent matched the television station at the start of the intercept on eight consecutive spot checks, even though a different channel was on in the residence each time. Def. Exh. 2546. No credible explanation was offered to rebut the logical inference that the monitoring agents were listening without recording.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfuliy submitted,

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